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No. 03-829

In the Supreme Court of the United States

MARGARET A. PENN, PETITIONER

v.

LARRY A. BODIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether federal law-enforcement officers of the Bureau of Indian Affairs are entitled to quasi-judicial absolute immunity for executing of a tribal court order that excluded a non-Indian resident from the Standing Rock Sioux Tribe's reservation for 30 days.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 335 F.3d 786. The opinion of the district court (Pet. App. 10a-17a) and its subsequent clarification order (Pet. App. 18a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2003. A petition for rehearing was denied on September 11, 2003 (Pet. App. 31a). The petition for a writ of certiorari was filed on December 5, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During the period at issue in this case, petitioner lived within the reservation of the Standing Rock Sioux

Indian Tribe on land owned by a non-Indian. Although petitioner is one-eighth Turtle Mountain Chippewa, she is not an enrolled member of any Tribe. The Standing Rock Sioux Reservation straddles the border between North Dakota and South Dakota. Pet. App. 4a-5a.

When petitioner originally came to the reservation, she served as a tribal prosecutor. In 1996, however, she was fired from that position. She filed a civil action in tribal court to challenge her firing. Pet. App. 4a.

Petitioner then went to work for Tender Hearts Against Family Violence, Inc., a nonprofit organization serving battered women on the reservation. She became involved in a dispute with other Tender Hearts employees, including the organization's co-director, Faith Taken Alive. Pet. App. 4a.

In July 1998, Taken Alive filed a "Petition for Traditional Custom Restraining Order" in the tribal court, seeking to "restrain" petitioner "from contact with the residents of the Standing Rock Sioux Nation" by excluding her from the reservation. The petition alleged that petitioner was a threat to the safety of members of the Tribe and other reservation residents. Among other things, the petition alleged that petitioner had a gun, had threatened a former tribal judge and Tender Hearts personnel, and had filed a lawsuit against the Tribe. Pet. App. 4a-5a, 25a-27a. The tribal court granted the petition without giving notice to petitioner or conducting a hearing. The court issued an order directing "any Police Officer" to "escort [petitioner] from the Standing Rock Sioux Indian Reservation boundaries." The order provided that it was to remain in effect "for a period of thirty days, at which time a hearing will be scheduled." *Id.* at 5a, 27a.

2. The Division of Law Enforcement Services of the Bureau of Indian Affairs (BIA) is responsible for "the

enforcement of Federal law and, with the consent of the Indian tribe, tribal law" in Indian country. 25 U.S.C. 2802(c)(1); see 25 U.S.C. 2803 and (7) (Secretary of the Interior may charge BIA employees with "law enforcement responsibilities" and may authorize them to "perform any * * * law enforcement related duty"); 25 C.F.R. 12.21-12.22. As part of that responsibility, and as a matter of policy, BIA law-enforcement officers serve orders issued by tribal courts.

Respondent Captain John Vettleson, a BIA law-enforcement officer, was responsible for executing the tribal court order excluding petitioner from the reservation. Before doing so, Captain Vettleson consulted respondents Larry Bodin, the BIA Standing Rock Superintendent, and Richard Armstrong, the BIA District Commander, both of whom reviewed the order and advised Captain Vettleson to execute it. Pet. App. 5a.

Captain Vettleson sought the assistance of respondent Frank Landeis, the Sheriff of Sioux County, North Dakota, which contains the North Dakota portion of the reservation. Because Sheriff Landeis recalled that petitioner had given him the gun referred to in the petition for safekeeping, the officers brought that information to the attention of the tribal judge, who repeated his direction to execute the order. The officers served the order on petitioner at the Tender Hearts office. After allowing petitioner to retrieve some belongings from her residence, the officers followed her car to the reservation boundary. When petitioner asked what might happen to her if she returned to the reservation in violation of the order, Captain Vettleson responded that petitioner could be arrested. Pet. App. 5a-6a.

Petitioner brought a federal habeas corpus action to challenge the legality of her exclusion from the reserva-

tion. Because the tribal court subsequently vacated the order, however, the action was dismissed as moot. Petitioner settled her monetary claims against the Tribe, its officials, and its members for $125,000. Pet. App. 6a.

3. Petitioner brought this action in federal district court against, among others, the United States, Captain Vettleson, Superintendent Bodin, Commander Armstrong, and Sheriff Landeis. She sought damages against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, and against the individual respondents in their personal capacities under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and 42 U.S.C. 1983. See Pet. App. 6a, 13a, 18a.

The United States moved for summary judgment on behalf of the individual federal respondents on the ground, *inter alia*, that they are shielded from liability by quasi-judicial absolute immunity. Alternatively, the United States maintained that those respondents are entitled to qualified immunity because they did not violate any clearly established constitutional right. Pet. App. 4a, 10a.[1]

The district court denied the United States' summary judgment motion in relevant part. Pet. App. 10a-17a. The court acknowledged that "public officials who act pursuant to a facially valid court order issued by a court of competent jurisdiction enjoy quasi-judicial absolute immunity for enforcing the order." *Id.* at 14a-15a. The court further acknowledged that "[f]acially valid does not mean lawful and an erroneous order may still be valid" for purposes of quasi-judicial immunity. *Id.* at 15a.

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[1] A similar motion was filed on behalf of Sheriff Landeis, who has been separately represented throughout the proceedings.

The district court concluded, however, that the exclusion order in this case was not "facially valid." Pet. App. 16a. The court stated that the order was "patently unconstitutional" because it excluded petitioner from her place of residence "with absolutely no due process." *Id.* at 17a. Although the court observed that petitioner "is not a tribal member or even an 'Indian' for purposes of Tribal Court jurisdiction," the court added that "[t]he Order would be unconstitutional even if directed toward a tribal member." *Id.* at 16a.[2]

4. The Eighth Circuit reversed the denial of absolute immunity. Pet. App. 1a-9a.

While acknowledging "the presumption that qualified immunity is sufficient to protect government officials other than judges," the court of appeals explained that absolute immunity is extended "to other officials for acts taken pursuant to a facially valid court order." Pet. App. 7a. In particular, the court noted that "[a] police officer charged with service of a facially valid court order is entitled to carry out that order without exposure to a suit for damages." *Ibid.* The court declined petitioner's invitation to create an exception to that rule when the order is issued by a tribal judge, rather than a federal or state judge. *Ibid.*

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[2] The court also ordered that the United States be "substituted as the sole defendant on behalf of all other named defendants with regard to the claims filed by the Plaintiff under the Federal Tort Claims Act." Pet. App. 17a. The court subsequently issued an order clarifying that, notwithstanding the substitution of the United States with respect to petitioner's FTCA claims, petitioner's claims against respondents Vettleson, Bodin and Armstrong in their individual capacities had not been dismissed. *Id.* at 18a. Petitioner's FTCA claims against the United States remain pending and are not material to the issues raised in the certiorari petition.

Turning to the order at issue here, the court of appeals explained that the order, which "was signed by a tribal judge known to [respondents] and attested to by the clerk of court," would be "facially invalid only if it was issued in the 'clear absence of all jurisdiction.'" Pet. App. 8a (citing *Stump* v. *Sparkman*, 435 U.S. 349, 356-357 (1978)). The court found that the order was not facially invalid under that standard. *Id.* at 8a-9a. The court noted that, under this Court's decisions, Tribes have been recognized to possess a measure of civil authority over non-members, especially those who elect to "involve themselves with tribal activities." *Id.* at 8a-9a. Here, the court observed, petitioner "lived on the reservation, had worked for the tribe, had a large civil suit against the tribe, and had various other personal and professional ties to the tribe and its members." *Ibid.* Accordingly, the court concluded that, "[c]onsidering only the face of the order and the evidence relating to the verbal reaffirmation of that order, it is not apparent that [the tribal judge] was acting in the clear absence of jurisdiction." *Ibid.*

ARGUMENT

The court of appeals' decision is correct, does not conflict with any decision of this Court or any other court of appeals, and turns on the unique facts of this case. This Court's review is therefore unwarranted.

1. As this Court has recognized, judges are entitled to absolute immunity from liability under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and 42 U.S.C. 1983 for their judicial acts, see *Stump* v. *Sparkman*, 435 U.S. 349, 346-347 (1978), and other officers are entitled to comparable immunity for acts that are intimately associated with the judicial process. See, *e.g.*, *Burns* v.

Reed, 500 U.S. 478, 487-492 (1991) (prosecutor is entitled to absolute immunity in connection with appearing in court and presenting evidence in support of a search warrant); *Briscoe* v. *LaHue*, 460 U.S. 325, 332 (1983) (police officer is entitled to absolute immunity in connection with giving testimony at a criminal trial); *Imbler* v. *Pachtman*, 424 U.S. 409, 431 (1976) (prosecutor is entitled to absolute immunity for initiating a prosecution and presenting the State's case). In *Stump*, the Court explained that a judge is not deprived of absolute immunity merely "because the action he took was in error, was done maliciously, or was in excess of his authority." 435 U.S. at 356. "[R]ather," the Court continued, a judge "will be subject to liability only when he has acted in the clear absence of all jurisdiction." *Id.* at 356-357 (internal quotation marks omitted).

Applying those principles, the courts of appeals have recognized that, so long as a judge would be entitled to absolute immunity for entering an order, a law-enforcement officer is entitled to absolute immunity for executing it. The courts have repeatedly stated that the inquiry into whether the officer is absolutely immune in such circumstances turns on whether the court order is "facially valid." *Mays* v. *Sudderth*, 97 F.3d 107, 112-113 (5th Cir. 1996); *Roland* v. *Phillips*, 19 F.3d 552, 556 (11th Cir. 1994); *Patterson* v. *Von Riesen*, 999 F.2d 1235, 1240 (8th Cir. 1993) (citing cases); *Valdez* v. *City of Denver*, 878 F.2d 1285, 1289 (10th Cir. 1989); cf. *Erskine* v. *Hohnback*, 81 U.S. (14 Wall.) 613, 616-617 (1871).

That rule is correct. The threat of liability for enforcing facially valid orders would undermine the judicial process. Law-enforcement officers should not be required "to act as pseudo-appellate courts scrutinizing the orders of judges." *Roland*, 19 F.3d at 556 (quoting

Valdez, 878 F.2d at 1289). Instead, they should be entitled to rely on the judicial process to ensure the lawfulness of court orders. See *Patterson*, 999 F.2d at 1240 (officials "should not be required to make the Hobson's choice between disobeying the court order or being haled into court to answer for damages"). Similarly, a court should be able to expect that its order will be executed unless it is vacated by the court itself on reconsideration or is reversed by a higher court. Courts should not have their orders reviewed—and negated—by the officers charged with executing them. See *Coverdell* v. *Department of Soc. & Health Servs.*, 834 F.2d 758, 765 (9th Cir. 1987) ("The fearless and unhesitating execution of court orders is necessary if the court's authority and ability to function are to remain uncompromised.").

2. Petitioner does not take issue with the settled rule that law-enforcement officers are entitled to quasi-judicial absolute immunity when they enforce the facially valid orders of federal and state courts. But petitioner contends that the rule should not apply when an officer executes the facially valid order of a tribal court. See Pet. 17-20. Petitioner is mistaken.

Although petitioner asserts that "[t]ribal [c]ourts are not courts of 'general jurisdiction'" (Pet. 18), that fact does not distinguish tribal courts for present purposes from federal courts, which are likewise courts of limited jurisdiction, and from many specialized state courts. And, although petitioner also asserts that tribal courts are "outside of our constitutional system" (*ibid.*), that assertion is inaccurate and, in any event, is irrelevant to the question here.

To be sure, tribal courts, like state courts, are not "authorized by the Constitution" (Pet. 18), and tribal court judgments, unlike federal and state court judg-

ments, are not directly reviewable by this Court. Tribal courts nonetheless are not wholly outside the constitutional system. Congress has plenary power over the scope of tribal self-government, including the jurisdiction of tribal courts. And, although the Bill of Rights and the Fourteenth Amendment do not apply of their own force to tribal governments, Congress has required tribal governments to provide similar fundamental protections by statute. See 25 U.S.C. 1302. Congress has also provided that certain judgments of tribal courts may be challenged in a federal habeas proceeding, see 25 U.S.C. 1303—a provision that petitioner herself invoked to assert a challenge (which became moot) to the underlying tribal court order in this case.

More to the point here, tribal court judgments and orders enjoy the status and respect accorded to them by federal law. See *e.g.*, 18 U.S.C. 2265(a); 25 U.S.C. 1911(d); 25 U.S.C. 3106(c); see generally 25 U.S.C. 3601. BIA personnel, such as the federal respondents here, are charged by statute and regulation with certain law-enforcement responsibilities involving tribal law. See 25 U.S.C. 2802(c), 2803; 25 C.F.R. 12.21-12.22. Among those responsibilities is the execution of facially valid civil orders of tribal courts. In light of these federal statutory provisions affirming the status of tribal courts and providing for BIA officers to enforce their orders, it advances the federal statutory scheme to accord BIA officers who enforce tribal court orders the same immunities that are generally recognized for officers who enforce orders of federal and state courts.

Petitioner does not identify any other federal appellate decision that considered the question whether federal (or state) officers are entitled to absolute immunity for enforcing tribal court orders. There is consequently no split of authority on the issue and no reason to

suppose that the question arises with sufficient frequency to merit the Court's review.

3. The remainder of the petition is devoted to arguing that the tribal court order in this case was facially invalid—or, put differently, that the tribal court issued the order "in the clear absence of all jurisdiction," *Stump*, 435 U.S. at 357 (internal quotation marks omitted). See Pet. 10-17. But that claim is inextricably bound up with the unique facts of this case. Accordingly, even if there were any merit to the claim (which there is not), the claim is not one of general importance warranting the Court's resolution.[3]

The tribal court order—whatever its ultimate legality under tribal law (see note 3, *supra*) or otherwise—was not facially invalid. As the court of appeals observed, the order "was signed by a tribal judge known to [respondents] and attested to by the clerk of court." Pet. App. 8a. The order recited that it was entered "in accordance with the Traditional Tribal customs and laws," and for the legitimate purpose of "protect[ing] the members of the Tribe and others residing on the reservation." *Id.* at 27a. The order also stated that petitioner's exclusion was an interim measure and that a further hearing would be scheduled on the matter. *Ibid.* The order thus had sufficient indicia of regularity to justify respondents in executing it without risk of personal liability.

Although petitioner relies on decisions of this Court recognizing limitations on Tribes' authority over non-

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[3] It appears unlikely that the Standing Rock Sioux tribal court will issue another order of the sort at issue here. As the Tribe explained in seeking to intervene in the tribal court to obtain vacatur, the order "was not authorized by Tribal law" and was contrary to the tribal constitution. Pet. App. 50a-51a.

Indians, those decisions do not address whether a tribal court may enter a civil order excluding a non-Indian lessee from a reservation for a relatively short period of time.[4] See, *e.g.*, *Nevada* v. *Hicks*, 533 U.S. 353 (2001) (holding that a tribal court lacked the authority to adjudicate tort claims or Section 1983 claims against state law-enforcement officers who entered a reservation to execute a search warrant seeking evidence of an off-reservation crime); *South Dakota* v. *Bourland*, 508 U.S. 679 (1993) (holding that a Tribe lacked the authority to regulate hunting and fishing by non-Indians in an area taken by the federal government for a dam and reservoir project); *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (holding that a Tribe lacked the authority to zone fee lands in a reservation's "open" area, but had the authority to zone property in reservation areas closed to the general public). Petitioner's reliance on *Hicks* is particularly misplaced because this Court did not issue its decision in *Hicks* until nearly three years after the events at issue here. *Hicks* could not have provided any guidance to the officers (or the tribal court) and would not be relevant even for qualified immunity purposes.

Indeed, while the Court has not had an occasion to rule on the extent of a Tribe's authority to exclude non-Indians who are perceived to pose a threat to reservation security, the Court has acknowledged the authority to exclude in at least some circumstances. See *Duro* v. *Reina*, 495 U.S. 676, 696 (1990) ("The tribes also possess their traditional and undisputed power to

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[4] Because petitioner is not a member of the Standing Rock Sioux Tribe or any other Tribe, the case has proceeded on the assumption that petitioner, despite her Indian heritage, is a non-Indian for present purposes. See Pet. App. 4a.

exclude persons whom they deemed to be undesirable from tribal lands."); *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) (stating that Tribes possess the "well established" power "to exclude nonmembers entirely" from their reservations); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 141, 144 (1982) (observing that "a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands," and that "[n]onmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them"); see also *Strate* v. *A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997).

More generally, the Court has recognized that Tribes' civil authority over non-Indians is greatest when such persons "enter consensual relationships with the tribe or its members" or engage in "conduct threaten[ing] * * * the health or welfare of the tribe." *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981). Petitioner entered into a consensual relationship with the Tribe by living and working on its reservation; she herself resorted to the tribal court to adjudicate her employment dispute with tribal officials. And as the text of the tribal court order indicates, petitioner was perceived to be a potential threat to the welfare of the Tribe's members and the entire reservation community.

At a minimum, in the absence of any square holding from this Court (or any other court) that a tribal judge is entirely without authority to issue an order temporarily excluding a non-Indian from a reservation, an order of the sort at issue here cannot be said to have been facially invalid or entered in the "clear absence of all jurisdiction." *Stump*, 435 U.S. at 356-357; cf. *Hardin* v. *White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985) (sustaining the authority of a tribal court to exclude a non-member permanently from a reservation).

Law-enforcement officers cannot, and should not, be required to postpone the enforcement of a tribal court order, if facially valid, while they analyze intricate questions of tribal authority of the sort that have long perplexed appellate judges and scholars.

Petitioner further contends that, although the tribal court order purported to be "civil" in character (Pet. App. 25a), the order should be understood as imposing a criminal penalty, which Tribes are without jurisdiction to impose on non-Indians. See Pet. 13-15. Whatever the merits of petitioner's argument, it does not call into question the validity of the order as a facial matter. Nor is there any reason to conclude that the order was intended to impose a criminal sanction. The stated purpose of the order was prophylactic, not punitive: "to protect the members of the Tribe and others residing on the reservation" from the risk of future harm by temporarily "restrain[ing] [petitioner] from contact with the residents" of the reservation. Pet. App. 25a, 27a.[5]

4. Finally, even if there were any question whether the federal respondents are entitled to quasi-judicial absolute immunity in this case, they would be entitled

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[5] Petitioner errs in asserting that the Eighth Circuit's decision in this case conflicts with the Second Circuit's decision in *Poodry* v. *Tonawanda Band of Seneca Indians*, 85 F.3d 874, cert. denied, 519 U.S. 1041 (1996). See Pet. 14. In *Poodry*, the court held that the permanent exclusion of tribal members from a reservation for acts of alleged "treason" was a criminal sanction for purposes of federal habeas review. See 85 F.3d at 888-889, 895-897. The exclusion order here contrasts with the one in *Poodry* in at least three respects. Petitioner's exclusion was not ordered for punitive purposes, she was not a member of the Tribe, and her exclusion was temporary. Nothing in *Poodry* suggests that an order of the sort involved in this case must be regarded as criminal in nature.

to qualified immunity. Qualified immunity shields government officials from personal liability so long as they do not violate "clearly established statutory or constitutional rights." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). It was hardly clear at the time of the underlying events in this case that the tribal court would lack the authority to issue the order or that respondents would violate petitioner's constitutional or statutory rights by executing the order. Accordingly, even if petitioner were to prevail in her challenge to the court of appeals' ruling on absolute immunity, the ultimate result in this case would be the same.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2004

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[6] Petitioner does not request that the petition be held for disposition in light of *United States* v. *Lara*, No. 03-107 (argued Jan. 21, 2004). Nor would there be any reason for the Court to do so. *Lara* presents the question whether Congress validly restored the Tribes' sovereign authority to exercise criminal jurisdiction over members of other Tribes. Whatever the Court's resolution of that question, it would not affect the facial validity of the civil order in this case.